Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1937

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH C. GIOFFRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a police officer who knowingly receives extorted payments must retain the payments for his own benefit in order to be convicted under the Hobbs Act.

2. Whether a police officer who knowingly passes on extorted payments to other police officers so that they will not take action against an illegal enterprise may be convicted under the Hobbs Act of extortion "under color of official right."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A6-A29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1986. The petition for a writ of certiorari was filed on May 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to two years' imprisonment and a $5000 fine. The court of appeals affirmed (Pet. App. A6-A29).

The evidence at trial showed that Lester Barry ran illegal numbers operations and poker machines in Philadelphia. Barry paid money once a month to petitioner, a Philadelphia police officer, for protection from arrest. Pet. App. A13-A14. Barry and petitioner had known each other for more than 25 years, but petitioner did not work in the district in which Barry ran his illegal operation.

It was Barry who first approached petitioner and asked him to arrange payoffs to the police officer who worked in the police district where Barry was operating. Petitioner agreed to accept the monthly payoff money and transfer it to the pertinent police officers so that Barry would be protected from arrest for his illegal activities. Records seized from Barry's operation showed that from 1979 through 1981 Barry made numerous payments to petitioner under the code name "Joe DiMaggio." Pet. App. A14.

At trial and on appeal, petitioner contended that he had not acted "under color of official right," as required by 18 U.S.C. 1951(b)(2). The jury returned a guilty verdict after being instructed that, in order to convict, it must find "that the public official knowingly used his office to acquire money not due him for performance of his official duties" (Pet. App. A28).

ARGUMENT

1. Petitioner first argues (Pet. 10-12) that he did not commit extortion within the meaning of the Hobbs Act because he did not receive any benefit from the extortion, but merely passed it on to other police officers. The court of appeals properly rejected this argument (Pet. App. A12-A15).

The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" (18 U.S.C. 1951(b)(2)). As the

statutory language unambiguously states, a person may violate the Hobbs Act without himself receiving the benefit of the property obtained. See *United States* v. *Green*, 350 U.S. 415, 420 (1956) ("extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property"); *United States* v. *Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982) ("Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, * * * rather than to the public official who has acted under color of official right."), cert. denied, 461 U.S. 913 (1983); *United States* v. *Cerilli*, 603 F.2d 415 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Trotta*, 525 F.2d 1096, 1098 n.2 (2d Cir. 1975) (fact that extorted payment benefited a third party "does not lessen [defendant's] culpability under the statute"), cert. denied, 425 U.S. 971 (1976); *United States* v. *Provenzano*, 334 F.2d 678, 686 (3d Cir.) ("it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom"), cert. denied, 379 U.S. 947 (1964).

Petitioner cites no contrary authority and, in fact, appears to concede the validity of this reading of the statute. He nonetheless claims that the statute does not apply to a mere "messenger." But even if the statute could not reach one who unwittingly served as a conduit of extorted funds from payor to payee, petitioner is not such a person. Petitioner accepted Barry's payments and, in turn, gave them to the police officers in charge of Barry's district with the understanding that the officers would not arrest Barry for gambling violations. As the district court stated in denying petitioner's motion for a new trial, petitioner "[knew] that Mr. Barry relied upon his badge to pass money through to others in the police department. * * * [Petitioner] knew and appreciated what he was doing with the money, what the money was for, * * * [and] the business in which Mr. Barry was engaged * * *." Pet. App. A1-A2. Petitioner was

no mere messenger, but an active, knowing participant in the illegal scheme. In these circumstances, it is settled under the cases cited above that he could properly be convicted notwithstanding his lack of benefit from the scheme.

2. Petitioner next argues that he did not act "under color of official right" (Pet. 12-15). Petitioner observes that it was the other police officers, not he, who provided protection to Barry's illegal business, and that it was Barry who convinced him to carry the illegal payments to other police officers, rather than vice versa. The court of appeals properly rejected petitioner's contention.

Although petitioner asserts that the facts are otherwise (Pet. 13), the jury (see Pet. App. A27-A29), the district court (Pet. App. A1, A2), and the court of appeals (Pet. App. A14-A15) found that it was by virtue of his position as a police officer that petitioner obtained and passed on money that Barry paid to keep the police from shutting down an illegal gambling operation. No further misuse of office was necessary. As the court of appeals noted (Pet. App. A12), the Hobbs Act merely requires that the government prove that "a public official obtained money to which he was not entitled and which he obtained only because of his official position." *United States* v. *Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981). Additionally, "[t]he requirement that the money be taken 'by color of his office' meant 'simply that the officer must have taken money not due him for the performance of his official duties.' " *United States* v. *Jannotti*, 673 F.2d 578, 595 (3d Cir.) (en banc) (quoting *State* v. *Weleck*, 10 N.J. 355, 372, 91 A.2d 751, 759 (1952)), cert. denied, 457 U.S. 1106 (1982). "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); see also *United States* v. *Butler*, 618 F.2d 411, 418 (6th Cir.) ("a

showing that the motivation for the payment focuses on the recipient's office * * * is sufficient to convict under the Hobbs Act"), cert. denied, 447 U.S. 927 (1980). Thus, it is of no significance that petitioner was not the specific individual within the police department who provided protection to the illegal gambling business.

Nor is it significant that Barry approached petitioner rather than vice versa. The courts of appeals have repeatedly rejected the argument that the Hobbs Act applies only to corrupt payments induced by the public official, as opposed to bribes or corrupt payments that the public official has passively accepted. See, *e.g., United States* v. *Paschall*, 772 F.2d 68 (4th Cir. 1985), cert. denied, No. 85-1010 (Apr. 21, 1986); *United States* v. *Jannotti*, 673 F.2d at 595; *United States* v. *Hedman*, 630 F.2d at 1195 & n.5 (collecting cases); *United States* v. *Williams*, 621 F.2d 123, 124 (5th Cir. 1980), certs. denied, 450 U.S. 919 (1981) and 459 U.S. 1111 (1983); *United States* v. *Butler*, 618 F.2d at 419-420.

The one case on which petitioner relies, *United States* v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc), is not to the contrary. In that case, the defendant public official had accepted gifts from companies whose performance he oversaw under a public contract. As the court of appeals pointed out, however, "there was very little evidence that O'Grady asked for or demanded benefits, that he offered *quid pro quo* in exchange for benefits, that he forestalled official action in anticipation of receiving benefits, or that he misused his public office in any way" (742 F.2d at 692). The district court in *O'Grady* instructed the jury that in order to convict it need find only that benefits were conferred because the defendant was a public official and that the defendant knew the benefits were conferred for that reason (*id.* at 688). The Second Circuit reversed, holding that "the charge to the jury omitted an essential element of the offense, *to wit*, a finding that O'Grady misused his office to

obtain benefits not due him or his office" (*id.* at 692-693). The district court's instruction in *O'Grady* would have allowed the jury to find that any public official who accepted any gift, no matter how small, had violated the Hobbs Act, even in the absence of any promised, threatened, or actual action by that public official related to the gift. That interpretation of the Hobbs Act, the court of appeals concluded, "would place every public official in jeopardy by virtue of his status rather than his venal acts." *Id.* at 693.

O'Grady protects public officials against Hobbs Act convictions for accepting unsolicited gifts, without more. See *United States* v. *Campo*, 774 F.2d 566, 568 (2d Cir. 1985). It provides no comfort to those who misuse their offices to commit "venal acts" directly tied to the money they accept, such as petitioner's active participation in a scheme by which an illegal gambling operator paid protection money to the police.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1986

DOJ-1986-07